

No. 17642

In the

United States Court of Appeals

For the Ninth Circuit

MAURICE LIBERMAN, JOSEPH GREVEY and JACK
GREVEY, co-partners, d.b.a. DUKE CITY LUM-
BER COMPANY, and DUKE CITY LUMBER COM-
PANY, a partnership,

Appellants,

vs.

GEORGE H. NAGEL, MABEL J. NAGEL, ROBERT
T. JENKINS and GEORGIA MAE JENKINS, gen-
eral partners, and GEORGIA MAE JENKINS,
Trustee for JAMES HENRY NAGEL, limited
partner, d.b.a. NAGEL LUMBER & TIMBER
COMPANY, a limited partnership, and NAGEL
LUMBER & TIMBER COMPANY, a limited part-
nership,

Appellees.

Petition for Rehearing

(with Suggestion for Rehearing en Banc)

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Appellants respectfully ask for a rehearing of this appeal upon each of the following grounds:

First, in affirming the judgment "in all respects" this Court has failed to correct a clearly apparent, mathematical error in the computation of the "loss of anticipated profits" which the court below awarded to appellees as damages. This error lies in the omission of any deduction for the "interest cost" of the money which appellees would have had to invest in the purchase of the business if they had been permitted to join in its purchase. The trial court did deduct the interest due to the Gallaghers (the previous owners, from whom appellants were buying the property) upon the deferred instalments of the purchase price (R. 154-155; Finding 19(e), R. 193). The trial court concluded, however, that after the purchase price was actually paid to the Gallaghers it would be recovered by appellees through "depreciation" (R. 155), and for that reason the trial court did not deduct the appellees' share of the purchase price, as such, in computing their net damages.

But even if the purchase price itself should ultimately be recovered by appellees through depreciation (a most optimistic assumption), there would inevitably be a substantial time-lag between the date of each payment by appellees on the purchase price and the date of appellees' recovery of the payment by way of depreciation. During that time-lag appellees' money would be tied up in this business and not earning interest or other income elsewhere in some other form of investment. (This earning power of funds is often called "interest cost" or "cost of money".)

In computing appellees' net loss, the trial court made no allowance for the earning power or interest cost of appellees' money during the time the money was to have been invested in this business. The trial court expressly so stated (R. 158-159).

The trial court did, quite properly, make an allowance, at the rate of 6% per annum, for the interest cost of the money appellees would have had to provide as "working capital" to operate the

business. This is stated by the trial court in its Memorandum (R. 197), as quoted at pages 11 and 12 of this Court's printed opinion herein. Clearly it was error not to make a similar allowance for the interest cost of the money to be used in paying the purchase price itself.

This error is one which can be readily corrected by this Court upon the present record and without the necessity of referring the case back to the trial court for further proceedings. The amount of this interest cost, converted to a present value basis, is \$44,812.00, computed as follows:

	①	②	③	④	⑤	⑥
Year	Nagels' Investment Per Plaintiffs' Exhibits 4 and 11	Recovery by Nagels Via Depreciation at \$3.57 Per M Per Finding 19(f)	Nagels' Net Investment or Net Recovery During the Year (Col. 1 minus Col. 2)	Nagels' Cumulative Net Investment at Year-End	Interest Cost of Nagels' Net Cumulative Investment for the Year at 6%	Present Value of Col. (5) Per Finding 19(f) Discount Formula
1958.....	\$ 5,417		\$ 5,417	\$ 5,417	\$ 27	\$ 27
1959.....	65,000	\$53,550	11,450	16,867	1,012	1,012
1960.....	65,000	53,550	11,450	28,317	1,699	1,699
1961.....	65,000	53,550	11,450	39,767	2,386	2,294
1962.....	140,338	53,550	86,788	126,555	7,593	7,020
1963.....	59,583	53,550	6,033	132,588	7,955	7,072
1964.....		28,649	(28,649)	103,939	6,236	5,331
1965.....		21,554	(21,554)	82,385	4,943	4,063
1966.....		21,554	(21,554)	60,831	3,650	2,885
1967.....		21,554	(21,554)	39,277	2,357	1,791
1968.....	75,338	21,554	53,784	93,061	5,584	4,080
1969.....		18,641	(18,641)	74,420	4,465	3,137
1970.....		18,641	(18,641)	55,779	3,347	2,261
1971.....		18,641	(18,641)	37,138	2,228	1,447
1972.....		18,641	(18,641)	18,497	1,110	693
1973.....		18,641	(18,641)			
						<u>\$44,812</u>

Column (1) shows the amount appellees would have had to pay each year upon the purchase price of the property according to the contract (Pl. Ex. 4, § 4, page 7). It also includes appellees' share of the cost of replacing fully depreciated equipment at the end of each of the years 1961 and 1967, as shown in appellees'

depreciation schedule (Pl. Ex. 11; R. 1441), which was approved by the trial court (R. 198; Opinion herein, page 12). (These figures do not include (a) working capital, the interest cost of which is already covered in the trial court's computation or (b) interest on the deferred instalments of the purchase price, which also is already covered in the trial court's computation.) Column (2) shows the amounts of money which the trial court assumed appellees would recover each year by way of depreciation at the court's computed rate of \$3.57 per thousand board feet of lumber processed during the year as determined in Finding 19(f) (R. 194). Column (3) is the net amount of money required of the appellees each year—viz., the year's cash outlay or investment minus the year's recovery, or Column (1) minus Column (2). Column (4) is the cumulative sum of the annual amounts appearing in Column (3), thus showing the net amount of money of appellees which would remain invested in the business at the end of each year. The interest cost of this amount of money for the year is shown in Column (5), using the same 6% rate which the trial court used in computing the interest cost of the necessary working capital. In Column (6) these yearly interest costs are reduced to present value as of the judgment date, using the same discount formula which the trial court used in converting future profits to present value in Finding 19(f) (R. 194).

The sum of Column (6)—\$44,812.00—is the present value of the interest cost of funds appellees would have had to invest in the business (over and above working capital and over and above interest on the deferred instalments of the purchase price) in order to purchase and own half of the business. This interest cost represents the present value of each dollar of appellees' money invested in the business for the period between the date of that dollar's investment in the business and the date of its recovery through depreciation.

The judgment should be corrected by deducting this \$44,812.00 from the \$429,883.40 awarded. The amount of the corrected judgment would be \$385,071.40.

Second, in rejecting the standard rule of damages for breach of contract for the sale of property, measured by the excess of the value of the property over the contract price, and approving instead an entirely new rule of damages, measured by estimates of profits which could be made by operating the property as a business, this Court ignored—it did not even notice or mention, let alone discuss or evaluate—the following:

(a) The utter absence of any evidence that the appellees were bargaining for a business operation.

(b) Appellees' own repeated, consistent and unqualified testimony that what they were bargaining for was to eliminate the competition represented by the Gallagher mill and its "position in the forest," so that appellees' own existing mill (the Nagel Mill) could continue to operate profitably.

(c) The uncontradicted, unqualified, and unmistakable testimony of one of the plaintiffs-appellees (being the only valuation evidence in the record) that the reasonable value of the entire Gallagher property, including its "position in the forest," at the critical time was \$500,000.00, which means that the half-interest here in dispute was reasonably worth \$250,000.00 and that the damage award of \$429,883.40 was almost twice the value of the disputed property.

(d) The trial court's weird assumption that the Gallagher mill would for fifteen years be able to secure a steady supply of raw material from the United States government by successfully bidding for Forest Service timber at future public sales.

(e) This Court's own opinion in *Peters v. Lines*, 275 F.2d 919 (1960), which disallowed an award of damages for profits to be realized from future processing of timber not under contract or option.

Third, in answering appellants' contention that appellees did not accept the entire offer because they did not accept appellants' second letter, dated September 24, 1958, giving appellees a seven-year option to purchase the whole mill at an appraised price, this Court said in part (Opinion herein, page 15):

“But the other findings and conclusions sufficiently reveal that the Trial Court believed that appellees already had that option by reason of the September 20 oral agreement and the September 23 letter.”

There is nothing—not a word, not even a syllable—in the Findings and Conclusions to justify that statement.

Because this Court's opinion abandons the normal rule for measuring damages for breach of contract to sell property according to the excess of value over contract price—and adopts instead a rule which allows recovery of almost double the value of the property itself without reference to or deduction of the contract price—we respectfully suggest that the appeal should be reheard en banc.

Dated: April 19, 1963.

Respectfully submitted,

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CERTIFICATE

I hereby certify that in my judgment this petition for rehearing is well founded. I further certify that it is not interposed for delay.

BURNHAM ENERSEN

